No. 3848

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WALTON N. MOORE DRY GOODS CO., INCORPORATED (a corporation),

Plaintiff in Error,

vs.

COMMERCIAL INDUSTRIAL COMPANY, LTD. (a corporation), successors of J. J. Choorin & Co., A. V. Kassianoff & Co.,

Defendant in Error.

REPLY BRIEF FOR DEFENDANT IN ERROR.

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The statement of facts before the court is clearly set forth in the transcript (Tr. 17). This is an action brought by a New York corporation doing business in this district against a corporation alleged to have been organized under the laws of Siberia, and the complaint alleges that it was broken there.

It appears that the defendant is not, and never was a corporation organized under the laws of this state and that it has never had an office or place of business or property in this district and has never carried on business therein. It further appears that

the parties upon whom the pretended service of summons was made, were only temporarily and casually present in this district, and that neither of them are officers of the defendant, their only connection with the controversy having been an effort to ascertain the terms upon which the controversy existing between the plaintiff and defendant could be adjusted.

It is settled law that a foreign corporation cannot be sued in a jurisdiction other than the state in which it was created, unless it is doing business therein and maintains a business or managing agent subject to service of process.

Plaintiff in error maintains that the "valid service may be made on a foreign or alien corporation, in an action upon a contract between the parties, where such officer or agent is in the state expressly to represent his corporation as to such contract, regardless of whether the corporation maintains a regularly established place of business in the State", also that because "an individual may be served in any state where he may be found, a corporation should be entitled to no greater exemption". This statement is contrary both to the facts in the instant case and the law. Section 411 of the Code of Civil Procedure in setting forth the manner of serving process of summons upon defendants provides

> "for the delivery of a copy thereof if suit is against a foreign corporation or a non-resident, joint-stock corporation or association doing business and having a managing or business agent, cashier or secretary within this state; to such agent, cashier or secretary."

By absolutely no process of reasoning can it be successfully urged that the terms of this section apply to defendant in error.

The general and well settled rule of law to be applied on the foregoing statement of facts is clearly stated in the recent cases as follows:

> "Where a corporation is not doing business in a state, and the president or any officer is not there transacting business for the corporation and representing it in the state, it cannot be said that the corporation is within the state, so that service can be made upon it."
>
> Fitzgerald and Mallory Construction Co. v. Fitzgerald, 137 U. S. 98; 34 L. ed. 608; 11 Sup. Ct. Rep. 36.

See also

> Chipman v. Jeffery, 251 U. S. 373; 64 L. ed. 314.

> "A long line of decisions in this court has established that in order to render a corporation amenable to service of process in a foreign jurisdiction it must appear that the corporation is transacting business in that district to such an extent as to subject it to the jurisdiction and laws thereof."
>
> St. Louis S. W. R. Co. v. Alexander, 227 U. S. 217, 227.

All of the following cases decided by the Supreme Court of the United States sustain the foregoing propositions:

> The Lafayette Ins. Co. v. French, 18 Howard 404;
>
> St. Clair v. Cox, 106 U. S. 350;

Goldey v. Morning News, 156 U. S. 518;
Conley v. Mathieson etc., 190 U. S. 406;
Geer v. Mathieson etc., 190 U. S. 428;
Peterson v. Chicago, Rock Island & Pac. Ry. Co., 205 U. S. 364;
Green v. Chicago, Burlington & Quincy Ry. Co., 205 U. S. 530;
Mechanical Appliance Co. v. Castleman, 215 U. S. 437;
Herndon-Carter Co. v. Norris Son & Co., 224 U. S. 496.

With reference to the narrow or particular point involved in this case:

"The defendant has no office, place of business, agent, agency or property in Iowa and never had. It had never done business in Iowa * * * an officer going over the country 'does not carry the corporation in his pockets'. * * * *As yet, I cannot believe that a foreign corporation, having a difference with an Iowa citizen concerning a contract not made in this state surrenders itself to the Iowa courts because an agent with or without authority, comes to this state seeking to adjust such difference. If such be the law, then compromises so much favored by law are largely at an end as to foreign corporations.*" (Italics ours.)

Loudon Machinery Co. v. American Malleable Iron Co., 127 Federal 1009.

"I do not understand that Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. ed. 569, is authority for the proposition that the presence of an officer of a foreign corporation in this state for the purpose of discussing a proposed adjustment of the single

controversy between it and plaintiff is sufficient to establish such a 'doing business within the state' as will take the case out of the rule laid down in Goldey v. Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. ed. 517, and Conley v. Mathieson Alkali Works, 190 U. S. 406, 23 Sup. Ct. 728, 47 L. ed. 113. The controlling point in the Spratley case is stated on page 611 of 172 U. S., page 312 of 19 Sup. Ct. (43 L. ed. 572)."

Wilkins v. Queen City Savings Bk. & Trust Co., 154 Federal 173.

"Following these decisions, as I feel bound to do, the presence of Blandin in Troy, New York, for the purpose of discussing the matter referred to, even if in behalf of the corporation of which he was president, did not subject the corporation to the jurisdiction of the state courts for the purpose of serving the summons in the action; that is he was not transacting business within the meaning of the decisions. It was not like adjusting losses, etc."

Ostrander v. Deerfield, 206 Fed. 544.

"The business done by a foreign corporation must be of such character and extent as to warrant the inference that it has subjected itself to the jurisdiction * * *. In the present case the plaintiff is seeking to bring suit upon a cause of action arising some time before, in connection with transactions in England, between the plaintiff and defendant corporation. To hold that the defendant corporation may be sued in the United States because the managing agent took up certain business for it personally while travelling in this country, instead of conducting that business by letter, is impossible under the authorities.

"If the negotiation or business talks had taken place upon trains between San Francisco

and New York claim might be made that the defendant corporation was doing business in every district through which the train passed."

A foreign corporation may be sued in the Federal courts in any district in which it is found, but not elsewhere.

Smithson v. Roneo, 231 Federal 349.

Plaintiff in error seems to rely mainly upon the case of Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 Fed. 352; 118 C. C. A. 458; 43 L. R. A. (N. S.) 1015, which arose and was decided in this circuit. In disposing of the contention of plaintiff in error the learned lower court used the following language:

"The case of Premo Specialty Mfg. Co. v. Jersey-Creme Co., 200 Fed. 352; 118 C. C. A. 458; 43 L. R. A. (N. S.) 1015, from this circuit, principally relied upon by plaintiff, is readily distinguishable from the case of Doe v. Springfield Boiler & Mfg. Co. In the former case the facts showed that the contract sued upon was made and was to be performed in Los Angeles, where the suit was brought, and that the party upon whom service was made, was at the time, the secretary of the corporation and had come to Los Angeles where he was served, with reference to business transactions theretofore had between the parties, out of one of which the cause of action arose. In the present case it is conceded that the contract sued upon was made and was to be performed at Vladivostok; and that the parties served were neither of them officers of the company in any other respect than that Ivanoff was a general business representative of defendant for Canada and the United States, having his headquarters in New York, and had been merely specially requested to ascertain upon what terms the controversy

> between the parties could be accommodated. It is apparent therefore that there is nothing in that case which is at variance or out of harmony with the ruling in the case of Doe v. Springfield Boiler & Mfg. Co., and no purpose on the part of the court to ignore or depart from the principles announced in the latter case can be deduced from anything said in the former.''

We contend that the reasoning of the lower court as above quoted is unanswerable.

CONCLUSION.

Since it cannot be found in this district, and the court can acquire no jurisdiction of the subject matter, it is, in conclusion, respectfully submitted that the order of the lower court granting the motion to quash and dismiss the action should be affirmed.

Dated, San Francisco,
May 8, 1922.

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